

INTERNAL REVENUE SERVICE
District Director

Department of the Treasury

Date: NOV 29 1994

Case Number:

Employer Identification Number:

Person to Contact:

Telephone Number:

In reply refer to:

Dear Applicant:

We have considered your application for recognition of exemption under section 501(a) of the Internal Revenue Code of 1986 as an organization described in section 501(c)(3) of the Code.

FACTS

The information submitted discloses that you were incorporated as a nonprofit corporation under the laws of the State of [REDACTED] on [REDACTED].

Article 3 of your articles of incorporation states that you were formed for "charitable, scientific, literary and educational purposes, including the making of distributions to or for the use of organizations which are formed and operated exclusively for charitable, scientific, literary and educational purposes and which qualify as exempt organizations under Section 501(c)(3) of the United States Internal Revenue Code of 1986, as amended."

Your organization is a dance band with Big Band instrumentation (full saxophone, rhythm, trumpet and trombone sections) plus a male and female vocalist. You provide entertainment to whomever will contract with you and pay you for your services. Typically, you perform at monthly dances for senior citizens, weddings, social events, and benefits. Members also meet one evening per week to practice and rehearse music.

According to section 3.1 of your Bylaws, you have two classes of members: regular and associate. The specific qualifications of a "regular" member is that the person must be available to attend regularly scheduled rehearsals and to play most jobs that the Band contracts to play. Regular members have a vote. Associate members are those persons who may perform at other functions or play as a substitute. Associate members have no vote.

Your sole source of income is from fees paid for performances. The fees you charge vary depending upon performance requirements,

Code	Initiator	Reviewer	Reviewer	Reviewer	Reviewer	Reviewer
	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Surname	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Date	11/29/94	11-23-94	11-28-94			

Form 1517 Correspondence Approval and Clearance Department of the Treasury/Internal Revenue Service

but average \$[REDACTED]/hour for the [REDACTED] piece orchestra. The majority, or [REDACTED] to [REDACTED]% of your expenses consist of "other salaries and wages." The balance of your expenses are for sound system rental, equipment purchases, members' Christmas party and miscellaneous office supplies.

As stated in your letter of [REDACTED], "other salaries and wages" consist of disbursements made to your members for a performance. The fee collected is divided among member performers on an equal share basis as follows: First, any expenses are paid (normally just for the sound system). The remaining funds are divided equally into shares. Each performer receives one share, two shares are reserved for the Orchestra and one additional share is divided among those members who set up for that performance, up to a maximum of \$[REDACTED] each.

LAW

Section 501(c)(3) of the Internal Revenue Code describes certain organizations exempt from income tax under section 501(a) and reads in part as follows:

"(3) Corporations, and any community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on legislation, (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

Section 1.501(c)(3)-1(a)(1) of the Income Tax Regulations provides that in order to be exempt as an organization described in section 501(c)(3), an organization must be both organized and operated exclusively for one or more of the purposes specified in such section. If an organization fails to meet either the organizational test or the operational test, it is not exempt.

Section 1.501(c)(3)-1(c)(1) of the Income Tax Regulations states that an organization will be regarded as "operated exclusively" for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt

purposes specified in section 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.

Section 1.501(c)(3)-1(c)(2) of the Regulations states that an organization is not operated exclusively for one or more exempt purposes if its net earnings inure in whole or in part to the benefit of a private shareholder or individual.

Section 1.501(a)-1(c) of the Regulations states that the words "private shareholder or individual" in section 501 refer to persons having a personal and private interest in the activities of the organization.

Section 1.501(c)(3)-1(d)(1)(ii) of the regulations provides that an organization is not organized or operated exclusively for one or more of the purposes specified in section 501(c)(3) unless it serves a public rather than private interest.

In Presbyterian & Reformed Publishing Co. v. C.I.R., 79 T.C. 1070 (1982), the Tax Court found that the manner in which the organization conducted its activities revealed a nonexempt commercial purpose that was substantial in nature. In making this determination, the court noted that whether an organization satisfies the operational test is essentially a question of fact. The court noted that where a nonexempt purpose is not an expressed goal of the organization, courts have nonetheless focused on the manner in which the organization conducts its activities, implicitly reasoning that an end can be inferred from the means chosen to attain it. If, for example, an organization's management decisions replicate those of commercial enterprises, it is fair to infer that at least one purpose of the organization is commercial.

In Better Business Bureau v. United States, 326 U.S. 279 (1945), held that the presence of a single none exempt purpose, if substantial in nature, will preclude exemption under section 501(c)(3) of the Code, regardless of the number or importance of statutorily exempt purposes.

ANALYSIS AND CONCLUSION

Based on the above and on the information in the file we conclude that you do not qualify for tax-exemption as an organization described in section 501(c)(3) of the Code because you are not operating for any purpose specified in that section but, are operating for the benefit of your members. Your activities consist of providing performances for anyone who contracts for your services. The net income of each performance is divided among the

members of your band who performed on that occasion. The Internal Revenue Code strictly prohibits the distributions of earnings to any "private shareholder or individual." Section 1.501(a)-1(c) of the Regulations defines a "shareholder" as any person who has a personal or private interest in the organization. This would include your members, each of whom has a voting interest in your organization.

If you are in agreement with this proposed determination, we request that you sign and return the enclosed agreement Form 6018, Consent To Proposed Adverse Action. Please note the instructions for signing on the reverse side of this form.

If you are not in agreement with this proposed determination, we recommend that you request a hearing with our office of Regional Director of Appeals. Your request for a hearing should include a written appeal giving the facts, law, and any other information to support your position as explained in the enclosed Publication 892. You will then be contacted to arrange a date for a hearing. The hearing may be held at the office of Regional Director of Appeals or, if you request, at a mutually convenient District Office. A self-addressed envelope is enclosed.

If we do not hear from you within 30 days from the date of this letter, and you do not protest this proposed determination in a timely manner, it will be considered by the Internal Revenue Service as a failure to exhaust available administrative remedies and will then become our final determination. Section 7428(b)(2) of the Internal Revenue Code provides in part that, "A declaratory judgement or decree under this section shall not be issued in any proceeding unless the Tax Court, the Court of Claims, or the district court of the United States for the District of Columbia determines that the organization involved has exhausted administrative remedies available to it within the Internal Revenue Service."

If you have any questions, please contact the person whose name and number appear at the heading of this letter.

Sincerely yours,

District Director

Enclosures:
Form 6018
Publication 892